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IN THE

# Supreme Court of the United States

Nos. 78-857 and 78-997

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*
v.
YESHIVA UNIVERSITY.

YESHIVA UNIVERSITY FACULTY ASSOCIATION,
*Petitioner,*
v.
YESHIVA UNIVERSITY.

**On A Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION TO SUBMIT BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

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## MOTION OF THE NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS FOR LEAVE TO SUBMIT A BRIEF AS *AMICUS CURIAE*

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To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the National Society of Professional Engineers ("NSPE") moves this Court for leave to file the accompanying brief as *Amicus Curiae* supporting the respondent, Yeshiva University, in this case. In support of this motion, the NSPE shows as follows:

1. The NSPE is a non-profit organization composed of over 67,000 members through 53 affiliated state organizations (including the District of Columbia, Puerto Rico and Guam) and approximately 500 local chapters. Its membership includes professional engineers engaged in virtually every specialized branch of engineering practice and activity—in industry, private practice, government, and education. From its inception, the NSPE has sought to bring to the attention of courts, administrative agencies, and appropriate committees of Congress, information and data concerning the impact of federal laws, rules and policies upon the public and upon the engineering profession. Because of its particular interest in maintaining and promoting standards of excellence in engineering education, a division of the NSPE exists devoted to "Professional Engineers in Education."

2. A significant number of NSPE members serve on engineering faculties at institutions of higher learning, including some private colleges and universities where collective bargaining agents have been chosen by the faculty,* and where the National Labor

* Of the approximately 600 campuses where faculty members have chosen to organize, 77 are private institutions. Bargaining has formally been rejected at 41 such institutions. The Chronicle of Higher Education 8 (June 26, 1978).



Relations Board (the "Board") has asserted jurisdiction under the provisions of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.* (61 Stat. 136, 73 Stat. 519, 88 Stat. 395) (the "Labor Act" or "NLRA").

The movant *Amicus*, and many of its members, thus have broad knowledge of the impact of unionization on the academic community in a variety of university and college settings. Because of this knowledge, the *Amicus* is particularly well situated to brief the Court on the practical as well as legal aspects of the issue presented here, namely, whether full-time faculty members at a mature university, such as Yeshiva, enjoy "managerial status" and thus are excluded from coverage under the Labor Act.

3. The written consents of counsel for the petitioner National Labor Relations Board and counsel for the respondent Yeshiva University have been filed with the Clerk of the Court. Counsel for the petitioner Yeshiva University Faculty Association indicated that he would not consent, thereby necessitating this motion.

WHEREFORE, it is respectfuly moved that the NSPE be granted leave to file the accompanying brief *Amicus Curiae* in this case.

Respectfully submitted,

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## BRIEF *AMICUS CURIAE* OF THE NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

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The National Society of Professional Engineers (NSPE) respectfully submits this brief as *amicus*

*curiae*, contingent upon the Court's granting of the accompanying motion, pursuant to Rule 42(3) of the Rules of this Court. The NSPE supports the position of the respondent, Yeshiva University, in urging the Court to affirm the decision of the Second Circuit Court of Appeals.

## INTEREST OF THE *AMICUS CURIAE*

NSPE's interest in the issues presented for the Court's review in this case is detailed in the accompany motion. (*Supra*, pp. 1-3).

## STATEMENT OF THE CASE

The facts of this case are fully set forth in the briefs of the parties and in the opinion of the Second Circuit. For present purposes, they may be summarized as follows:

In 1974, the Yeshiva University Faculty Association (the "Union") filed a representation petition with the National Labor Relations Board seeking certification as the bargaining agent of the full-time faculty members of most of the schools at Yeshiva University (the University). On the basis of facts adduced at a representation hearing, the Board found the full-time faculty members at the University to be professional employees entitled to vote for or against collective bargaining representation. The Board thereupon determined that such faculty members constituted an appropriate bargaining unit, and directed an election in that unit. Thereafter, the Union won the election and was certified by the Board. The University subsequently refused to bargain and contested the validity of the certification. (N.L.R.B. Cert. Pet. 2-14)



Upon charges filed by the Union, the Labor Board found that the University had violated Section 8(a)(5) and (1) of the Act, and issued a bargaining order. The Court of Appeals for the Second Circuit denied enforcement of the Board's order. While the court agreed with the Labor Board that the faculty members are professional employees under Section 2(12), 29 U.S.C. 152(12), it further held that they enjoyed managerial status as well, thus excluding them from coverage under the Act, *N.L.R.B.* v. *Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267 (1974). (N.L.R.B. Cert. Pet. at 42a; Cert. Pet. at 15-16).

## SUMMARY OF ARGUMENT

Although the NLRA is drafted broadly to cover a wide range of employment relationships, there are limits to both the types of employees intended to be covered and the types of enterprises to which the Act, without reservation, may legitimately be applied. *See, e.g., N.L.R.B.* v. *Bell Aerospace Co., Division of Textron*, 416 U.S. 267 (1974); *N.L.R.B.* v. *The Catholic Bishop of Chicago*, 47 U.S.L.W. 4283 (U.S. March 21, 1979). The relationship between faculty and administrators at mature universities[1] brings into play both of these limitations.

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[1] For purposes of this case, mature universities may be characterized, as suggested by the court below, as those institutions that have adopted a collegial decision making process in which the faculty contributes substantially to the development of institutional policy. 582 F.2d at 700.

1. The Court's decision in *Bell Aerospace, supra*, establishes that individuals who serve in a managerial capacity are excluded from the Act's coverage. Further, the opinion in that case makes clear that the Board may not limit the statutory exclusion to managerial personnel associated with the "formulation or implementation of labor relations policies," but rather must apply the exclusion to all those who occupy managerial status within originally developed definitional standards.

The cases cited by the Court in *Bell Aerospace* establish a conception of managerial status defined in terms of the extent to which discretion is exercised. *See, e.g., Eastern Camera & Photo Corp.*, 140 NLRB 569 (1963). If NLRA principles are to be applied at all to collegial academic institutions such as Yeshiva, these cases dictate the conclusion that their full-time faculty members must be considered "managerial personnel." For as the Second Circuit observed, members of Yeshiva's faculty exercise extensive control over the courses taught in the institution, the selection and assignment of teachers, the number of teaching hours required of the faculty, and the rank, salary, and tenure status of other faculty members. These responsibilities establish a degree of discretion at least as substantial as that found sufficient by the Board to exclude managerial employees in the industrial and commercial sphere from the Act's coverage. Indeed, "the crucial role of the full-time faculty in determining other central policies of the institution including, *inter alia*, the curriculum, admissions and graduation requirements, tuition, and in one instance, even the situs of a school" (582 F.2d 692) establishes a degree of discretion far greater



than that normally exercised by most industrial and commercial managerial employees. Thus, the Second Circuit's finding that the faculty at Yeshiva, "in effect substantially and pervasively operate[s] the enterprise" (*id.* at 693) clearly suffices to bring the decision below within the ambit of this Court's *Bell Aerospace* holding.

2. Although the Second Circuit limited its findings to the specific facts of the case before it, the *Amicus* submits that the status and responsibilities of Yeshiva's faculty members with respect to their university are typical of those of faculty members at mature universities generally.[2] Accordingly, we urge this Court to consider a more fundamental reason, not fully addressed by the court below, for excluding university faculty from the NLRA: The relationship between a mature university and its faculty members simply does not fit the model of employer-employee relationships which Congress had in mind when it enacted this statute. This is not to say that the Act can never legitimately be applied to institutions of higher learning. Non-academic personnel and teachers at proprietary schools, for example, may have a relationship with their college administrations that is sufficiently analogous to the commercial and industrial-type employment relationships Congress intended the Act to cover so that NLRA principles may apply without serious difficulty. See *N.L.R.B.* v. *Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975). But

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[2] The Board apparently agrees, as it has represented in its brief to this Court (Br. 22-23) that the role of Yeshiva's faculty members "is essentially the same as that of faculty members at other universities."

the process of shared and collegial decision-making at a mature university is incompatible with the two-party collective bargaining system envisioned by the Act. University faculty commonly determine the direction and nature of their enterprise, and commit the resources of the university, through such academic organizations as faculty senates. Imposition of the Act's scheme of bargaining between "management" and employee representatives generates inevitable conflicts between academic and labor organizations which make faculty coverage under the Act impractical. Recognition of this problem is reflected in the legislative history of the Act, which indicates that Congress did not intend college faculties to be covered.

3. Finally, in the absence of a clear expression of Congressional intent to bring university faculties within the coverage of the NLRA, the Act should not be construed in a manner which would require the Board and the courts to resolve difficult and sensitive questions about the guarantee of academic freedom inherent in the First Amendment to the Constitution. As the Court recently observed, "a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values." *Ambach* v. *Norwick, et al.*, 42 U.S.L.W. 4387 (U.S. April 17, 1979). It is essential that the guarantee of academic freedom include the right of professional faculty members to educate their students in the principles and practices of a profession without the inhibiting force of split loyalties created by government-sanctioned collective bargaining units. Similarly, union regulation of faculty members' rights and duties would create inevitable conflict with their own self-imposed systems of professional ethics and standards of conduct. Because First Amendment interests are involved, the NLRA should be construed to avoid such conflicts. See *N.L.R.B.* v. *The Catholic Bishop of Chicago*, 47 U.S.L.W. 4283 (U.S. March 21, 1979).



In sum, the majoritarian process inherent in the Act's scheme of collective bargaining necessarily circumscribes individual rights and professional obligations and, therefore, is difficult to reconcile with First Amendment guarantees in the academic context. Potential First Amendment problems are particularly acute, moreover, because the duty of fair representation imposed on unions under the NLRA does not provide an adequate safeguard against such majoritarian infringment of individual faculty members' rights. In order to avoid these latent constitutional conflicts that NLRA regulation of faculty-administration relations entail, this Court should affirm the decision of the court below and declare such relations clearly outside the intended scope and the Labor Act.

## ARGUMENT

### I. IF NLRA PRINCIPLES ARE TO BE APPLIED AT ALL, FACULTY MEMBERS AT MATURE UNIVERSITIES MUST BE CONSIDERED "MANAGERIAL PERSONNEL" AND THUS EXCLUDED FROM THE ACT'S COVERAGE.

In addition to a number of specific statutory employee exemptions in the Labor Act, including agricultural laborers, supervisors, and independent contractors, the NLRA has consistently been interpreted to exclude managerial personnel from its employee coverage as well. As noted by the Court in *Bell Aerospace*, *supra*, this implied exclusion has unmistakable support in the legislative history of the Taft-Hartley Amendments to the Act, wherein an amendment to exclude confidential employees from the Act was found unnecessary because "most of the people who would qualify as 'confidential employees' are executives and are excluded from the Act in any event." H.R. Rep. No. 245, 80th Cong. 1st Sess. (1947), at 23. Reinforced by the Board's early decisions acknowledging a managerial employee exclusion, *e.g.*, *Denver Dry Goods*, 74 NLRB 1167 (1947); *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 32 (1947); *Denton's Inc.*, 83 NLRB 35 (1949), this Court declared in *Bell Aerospace* that the Board "is not now free" to limit the statutory exclusion to managerial personnel associated with labor relations policies or other confidential matters. Rather, it must apply the exclusion to all those who occupy managerial status within the definitional standards originally developed by the Board in its early decisions, tacitly approved by Congress at the time of the Taft-Hartley Amend-



ments, and confirmed by "consistent construction of the Act for more than two decades." 416 U.S. at 289.[3]

As summarized by Chief Justice (then Circuit Judge) Burger, managerial employees are "those who formulate, determine and effectuate an employer's policies," [*AFL-CIO*, 120 NLRB 969, 973 (1958)], and those who have discretion in the performance of their jobs, but not if the discretion must conform to an employer's established policy, [*Eastern Camera and Photo Corp.*, 140 NLRB 569, 571 (1963)]. *Id.* at 289 n.16, *citing Retail Clerks International Ass'n* v. *N.L.R.B.*, 366 F.2d 642, 645 (D.C. Cir 1966), *cert. denied*, 386 U.S. 1017 (1967). Moreover, as the court below properly observed, those who perform managerial responsibilities need not do so individually, as is arguably the case under the supervisory exclusion,[4] but may do so collectively, as in fact was

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[3] The *Bell Aerospace* decision involved the question whether respondent's buyers were managerial employees. In a substantial amount of the company's sales, the buyer served as "team chairman" for a group of personnel who made purchasing decisions. 416 U.S. at 210. In ruling that such buyers were managerial employees excludable from the Act, this Court noted that:

> Extension of the Act to cover true 'managerial employees' would indeed be revolutionary, for it would eviscerate the traditional distinction between labor and management. If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly. 416 U.S. at 285 n.13.

[4] The Act defines a supervisor as:

> "Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in

connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11) (1976)].

The Labor Board has taken the position in this case, as it has in other university bargaining cases, that, read literally, the supervisory exclusion is applicable only to *individuals* who perform supervisory functions, and thus, the "collective authority" of university faculty to hire, fire, reward, discipline, etc. did not qualify as supervisory in nature. *See, e.g., C.W. Post College of Long Island Univ.*, 189 NLRB 634 (1974); *Adelphi Univ.*, 195 NLRB 639 (1972). Accordingly, in some cases, the Board has excluded deans from faculty bargaining units primarily because they exercised individual authority. *C.W. Post College of Long Island Univ., supra; University of Miami*, 213 NLRB 634 (1974). As the court below noted, however, the Board has not applied this dichotomy between individual and collective authority consistently. See *Florida Southern College*, 196 NLRB 888 (1972) (teaching dean excluded from faculty bargaining unit because he sat on a committee which made effective recommendations regarding the hiring and firing of faculty members). Although the court below opined that the Board's interpretation of the supervisory exclusion as encompassing only individuals not only was a questionable construction of the statute, but also was contrary to the modern corporate decision making process of group action, it declined to rule on the issue specifically, finding that the Board's own concept of "managerial employees" excluded from the Act the Yeshiva faculty. Nevertheless, the Board's failure to acknowledge the supervisory role of individual faculty members vis-a-vis nonprofessional employees, has not gone unnoticed:

> . . . the Board's inclusion in a bargaining unit of faculty members who supervise nonprofessional employees throughout the year seems to be a complete departure from established Board precedent. This departure is not supported by the legislative history of section 2(11). Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. Rev. 63, 135 (1973).



largely the case in *Bell Aerospace*. Over the years, a large variety of personnel that fit within these contours, including many whose responsibilities do not necessarily include labor relations, have been found to be managerial employees. *See, e.g., Astronautics Corp.*, 210 NLRB 652 (1974); *Hudson Motor Co.*, 55 NLRB 509 (1944) (buyers and others with authority to make financial commitments on behalf of their employers); *Wichita Eagle & Beacon Publishing Co.* v. *N.L.R.B.*, 480 F.2d 52 (10th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974) (editorial writers); *General Dynamics Corp.*, 213 NLRB No. 124; *Yale & Towne Mfg. Co.*, 135 NLRB 926 (1962) (senior engineers).

The Second Circuit's finding that the Yeshiva faculty exercised control over curriculum, teacher assignments, required teaching hours, and the rank, salary, and tenure status of other faculty members, establishes a degree of discretion at least as substantial as that found sufficient to exclude other types of managerial personnel from the Act in the cases cited above. In fact, the discretionary power of the faculty in an institution such as Yeshiva is far greater than that exercised by most managerial employees in the industrial and commercial sector. As the Second Circuit noted, the faculty play a crucial role in determining many central policies of the institution "including . . . in one instance, even the situs of a school." 582 F.2d 690. The court's observation that the faculty "in effect, substantially and pervasively operate[s] the enterprise," *id.* at 691, not only illustrates and underscores the fact that the faculty enjoys managerial prerogatives, but acknowledges, *sub silentio*, the unique relationship that exists between a uni-

versity administration and the faculty who effectively operate the institution.[5]

The government, however, fails to acknowledge that, if NLRA principles are to apply at all, this unique relationship reinforces the managerial status of faculty. Instead, the government argues that "rank and file faculty members" [6] have interests of

[5] "The faculty," it has been said, "by the very nature of the educational process in institutions of higher education, participate in decision-making which in private industry would normally be regarded as a management prerogative." Kahn, *supra* note 4, at 68.

As one example of the managerial function exercised by faculty, the *Amicus* wishes to note that shortly after the nuclear accident at Three Mile Island near Middletown Pa., Dr. William J. McGill, President of Columbia University, went before a meeting of engineering faculty to "request" that they not activate a small nuclear reactor on the Morningside Heights campus. The faculty subsequently declared a moratorium that would forestall activating or dismantling of the reactor. "Columbia's Engineering Faculty Agrees to Shelve Reactor Project," N.Y. Times, p. 38, col. 5-6, April 7, 1979. This relatively dramatic example illustrates the general principle that, "to a greater or lesser degree, there is a joint sharing of decision-making on campus which almost never exists in the entities with which the NLRB normally deals." M. Benewitz, "Bargaining in Higher Education," Proceedings of the 27th Annual Conference on Labor 43, 49 (N.Y.U. 1975).

[6] The government's repeated use of this term throughout its brief, of course, assumes the very issue in question. "Rank and file" by definition relates to a group which excludes leaders or officers. See WEBSTER'S COLLEGIATE DICTIONARY 956 (Merriam 1973). Due to the collegial decision-making nature of the mature university, however, no leaders or officers direct faculty members in either the formulation or implementation of the educational process.



their own, in terms of "obtaining pay raises and benefits which a board of trustees may resist;" thus, they lose managerial status under the Act. (N.L.R.B. Brief at 24; Cert. Pet. at 23-24). The question of managerial status, however, should be addressed in terms of the nature of the duties and the responsibilities of a particular job, not in terms of a "self-interest analysis." For had such an analysis been applied in *Bell Aerospace*, *supra*, the respondent's buyers similarly would not have qualified as managerial personnel once it was shown that they had an interest in obtaining pay raises and benefits which the board of directors may resist. Indeed, under such a rationale, it is difficult to imagine anyone in the employ of another qualifying as a managerial employee, since the self-interest of employer and employee rarely, if ever, are precisely the same.

Even if the "interest of the employer" doctrine were a valid approach, moreover, the government's argument would fail in this case because the court below found on this record that the interests of the faculty and those of the university were, in large part, coextensive.[7] Although the court analyzed interests on a functional basis only [as discussed *supra*], there is substantial evidence available that even the economic interests of faculty and university are intertwined to a degree far greater than in industry. Thus, in industry, employees, including managers, obtain salary increases normally as a result

[7] "Whatever the situation may be in other institutions, the record here establishes no significant divergence between the interests of the faculty and those of the administration or the Board of Trustees." 582 F.2d at 701.

of increased profits enjoyed by their employer. Even where profits do not rise, however, employees may enjoy salary increases where market forces and labor pressure compel employers to reduce profit margins. In the nonprofit, university setting, however, the economic interests of professor and university are far more interdependent. As formulators of policy on such matters, *inter alia*, as tuition levels and faculty salaries, faculty members often have a level of influence in the economic life of a college unparallel to the influence of many managers in industry. Not only does this participation in economic decision-making distort any contrived adversarial posture between professor and administrator, but in fact should serve [and often does] to encourage cooperation in the effort to protect the economic viability of such institutions.[8]

In sum, to the extent that principles derived from the NLRA may be applied to the relationship between administrator and university faculty at mature institutions where decision-making is shared,[9] the fac-

[8] In this respect, the negative economic impact of formal bargaining on the entire academic community should be noted. The cost of staff administrators for contract enforcement, legal representation and arbitration fees are not inconsequential. Indeed, "[f]or institutions which already have real economic problems, this is not a minor negative impact." Benewitz, *supra* 5, at 66.

[9] The qualification that faculty enjoy managerial prerogatives to qualify for their exclusion eliminates both non-academic personnel, and academic personnel at proprietary schools where their relationship to the university is comparable to that of an employee in a commercial setting. *Cf.*, *N.L.R.B.* v. *Yeshiva Univ.*, 582 F.2d 686, 702 (2d Cir. 1978) ("Of course it may well be that at other institutions the



ulty clearly serve a managerial function, and properly should be classified as managerial employees and so excluded from the Act's coverage. On the other hand, to the extent that application of traditional definitions of "managerial personnel" to faculty in higher education fails to fit neatly within the hierarchical decision-making structure contemplated by the statute, it is clear that, as illustrated below, the NLRA was not designed to encompass such a relationship, thus rendering inappropriate the assertion of jurisdiction by the NLRB.

## II. THE BOARD'S APPLICATION OF NLRA PRINCIPLES TO THE SYSTEM OF SELF-GOVERNANCE BY UNIVERSITY FACULTY VIOLATES BOTH THE INTENT AND THE DESIGN OF THE STATUTE.

As well illustrated by the case before the Court, at mature, collegially-oriented institutions, faculty members exert a pervasive influence over the affairs of their institutions. Thus, faculty commonly sit on committees that play a significant role in the search

Board of Trustees have in fact regularly reviewed and rejected faculty recommendations, but this is not the case at Yeshiva"); *N.L.R.B.* v. *Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975). The fact that university faculty generally enjoy such authority, however, and that this removes them from the status of employees, has perhaps best been expressed by Justice Cardozo:

> "The governing body of a university makes no attempt to control its professors and instructors as if they were its servants. By practice and tradition, the members of the faculty are masters and not servants . . . They have the independence appropriate to a company of scholars." *Hamburger* v. *Cornell Univ.*, 240 N.Y. 328, 336, 148 N.E. 539, 541 (1925).

for university officers, such as presidents and deans, as well as department chairman. Faculty more typically enjoy substantial influence over hiring and promotion matters. This is particularly the case with respect to professional faculty. One commentator has observed that "the governance mechanisms within universities and the so-called managerial function of governing boards have by in large been harmonized with the professionalistic traditions of the medieval university." McHugh, *Collective Bargaining with Professionals in Higher Education: Problems of Unit Determinations*, 1971 Wis. L. Rev. 55, 69. Those traditions, as the author indicates, resulted in medieval universities being governed by their faculties, with "teachers uniting into a corporate body enjoying, more or less, privilege." *Id.* at 65. "With respect to faculty," therefore, "certain traditional management-employee concepts simply do not pertain." *Id.* at 70.

Congress acknowledged the unique setting of the academic environment and its incompatability with NLRA principles during consideration of the Wagner Act. In defining a "labor dispute" under the Act, a Senate Report stated:

> The term "labor dispute" includes cases where the disputants do not stand in the proximate relation of employer and employee. An identical provision is contained in section 13(c) of the Norris-LaGuardia Act (U.S.C., title 29, secs. 101-115), and in most recent labor legislation dealing with disputes. *This definition does not mean that the Government could intervene in a "dispute" between an employer and, let us say, a critical college professor;* for jurisdiction under



> this bill depends upon the charge of an unfair labor practice affecting commerce, and *there could be no such practice involving the employer and the college professor.* S. Rep. No. 573, NLRB, Legislative History of the NLRA, at 2307 (1935).[10] [Emphasis added.]

Although the Board initially ruled that universities were not covered by the Act, *Trustees of Columbia University*, 97 NLRB 424 (1951), it subsequently reversed itself, relatively recently, in *Cornell University*, 138 NLRB No. 41 (1970).[11] Because the provisions of the Act assume the primacy of the trade union model and are not tailored to apply to the unique labor relations structure of academia, how-

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[10] This passage from the Wagner Act's legislative history was cited by this Court in support of its decision that teachers in church-operated schools are outside the jurisdiction of the Act. *N.L.R.B.* v. *The Catholic Bishop of Chicago*, 47 U.S.L.W. at 4287. It is manifest, however, that the language cited unequivocally indicates that Congress did not intend to include within the Act's coverage any "college professor," irrespective of an institution's religious affiliation.

[11] In the *Columbia University* case, the Board, relying upon the legislative history of the charitable hospitals exemption contained in the Taft-Hartley Amendments, declined to assert jurisdiction over clerical employees of the University Library. When the Board in the *Cornell University* case concluded that Congress has not excluded (other than hospitals) universities from the Act's jurisdiction, it assumed that faculty must be covered under the Act as employees of an employer subject to jurisdiction. No such assumption is warranted, however, and both legislative history and case law (*e.g. N.L.R.B.* v. *Catholic Bishop of Chicago, supra*) indicate that limitations on employee coverage within an enterprise or institution are permissible and, in this case, affirmatively mandated.

ever, a host of insoluble problems detrimental to both faculty and administration have accompanied the Board's assertion of jurisdiction, among them, an emphasis upon economic considerations to the detriment of academic matters; the inevitable waning of the shared authority concept; the interference with, and potential destruction of, faculty senates; difficulties in defining bargaining units; and the conflicts created between the demands of the Labor Act and the obligation imposed upon professional faculty by their own professional associations.

Commentators have observed that faculty unionization in higher education "generally results in the transformation of academic policy to employment conditions." Brown, *Collective Bargaining in Higher Education*, 67 Mich. L. Rev. 1067, 1075 (1969). *See also* Kahn, *supra* note 4, at 80. The Labor Act requires that employers meet with collective bargaining representatives to negotiate "wages, hours and other terms and conditions of employment." The Act, Section 8(d). As indicated previously, however, the dominion of the university professor transcends these subjects. The Labor Act does not compel the university administration to bargain over the direction of the enterprise, yet faculty often do so. Where an adversarial posture is taken in economic matters, it reasonably can be expected that academic concerns will become "bargaining chips," which faculty no longer will enjoy traditional rights to evaluate on their merits independently and with due deference from university administrators.[12] In sum, the trans-

[12] "Curriculum design has been largely in the province of the faculty so far in higher education. The faculty recommends it through the administration [management] to a board of trustees. [With unionization], a move will develop in boards towards more responsibility for the management to design the product for the management to plan the curricula." Remarks of Paul H. Newell, Jr., P.E., Proceedings of the Conference and Workshop on Engineering Education and Collective Bargaining, p. 27 (National Society of Professional Engineers, October 26, 1976).



formation of economic issues to an area requiring arms length negotiation between administration and faculty will encourage a reduction in the shared authority policy of universities, and thereby have the unintended effect of reducing the powers of the faculty.

The concept of shared governance is perhaps the most distinguishing feature of higher education. Kahn, *supra* note 4, at 69-70. This system of governance, which is completely foreign to the private industrial sector of the economy, *id.* at 74, results not only in faculty having influence in economic issues affecting their institutions, but also on educational and administrative policies, personnel administration, public issues vis-a-vis the institution, and procedures for faculty representation. *Id.* at 80 *citing American Association for Higher Education, Task Force Report, Faculty Participation in Academic Government* (1967). Since many of these areas range far beyond the statutorily mandated subjects for collective bargaining, university administrators may act outside the parameters of the Act to reduce the influence of faculty generally and thus gain an upper hand in economic bargaining. Such a result not only would compromise the viability of the faculty collective bargaining unit, but would undermine existing governance institutions, such as the faculty senates.

Traditionally, the vehicle for exercising shared governance in the university has resided in a "faculty senate" or similar body. The faculty senate often will determine: standards and policies for admission; honorary degrees and awards; grading; policies for minimum residency requirements; university research; computer usage; and academic regulations generally. Where unionization is permitted, the conflicts between the existing governance institutions and the union organization could easily become unmanageable, for many of the above topics present obvious overlaps of scholarly and security interests.[13] Moreover, there is the likelihood that the leadership of the two organizations will differ as well, since senior tenured professionals rarely form the major body of union leaders. "Thus," as one commentator has noted, "even with a single unit on campus, there must be a reallocation of power in faculty units, a division of responsibility in taking action or dealing with the administration, or even a demise . . . of traditional governance in whose place a system of administration action with faculty response through the grievance procedure will arise." Benewitz, *supra* note 5, at 52.[14]

[13] The primary purpose of the faculty senate is to present the faculty's view of how the institution should be operated. Under section 2(5) of the Act, the Labor Board would have little choice but to rule that most faculty senates constitute labor organizations and thus, continued relationships between a faculty senate and administration where a Board-recognized union exists could result in an unfair labor practice charge against the university. Kahn, *supra* note 4, at 150-51.

[14] A decline in the effectiveness and prestige of faculty senates already has occurred at some universities where the faculty has been unionized. At the University of Rhode Island, for example, the faculty was organized by the American Association of University Professors (AAUP) in 1972. Seven years later, a former chairman of the civil engineering department at the university reports that:

> "Prior to AAUP, the faculty senate was a generally respected body and the voice for faculty concern on such matters as salarly and faculty welfare issues, and was the faculty's official means of communicating with the administration. Because many of the these functions have been assumed by AAUP, today the senate's major contribution is the approval of curricular matters. The character and prestige of the senate have changed, and it is now difficult, particularly in the professional schools, to find faculty willing to serve a term on the senate."

McEwen, "Five Years of Faculty Collective Bargaining," ENGINEERING EDUCATION 319, 324 (American Society for Engineering Education, January 1979).



The consequences of unionization may be particularly harsh on a university professional school faculty where the Board determines that such professional group does not comprise a separate appropriate unit. Acknowledging that faculty members in professional schools share a separate community of interest by virtue of their simultaneous membership in the teaching profession and the profession that they teach, the Board has in some instances permitted separate unit representation. *See, e.g., Fordham University*, 193 NLRB 134 (1971); *New York University*, 205 NLRB No. 16 (1973). Although law and medical school faculty generally have been granted, upon petition, separate bargaining status, not all professional schools necessarily meet the eligibility criteria articulated by the Board.[15] Thus, for

[15] See, *e.g., Syracuse University*, 204 NLRB No. 85 (1973); *Fordham University*, 193 NLRB 134 (1971).

example, an engineering school may have in common with a law school a separate administrative entity within the university, separate accreditation standards, little exchange of faculty with the rest of the university, separate licensing requirements, and autonomous control of curricula—all factors deemed by the NLRB as evidence warranting separate unit status—but not have an autonomous operation, different calendar, or a separate governance committee, which also are considered determinative factors by the Board. Yet, the professionalism which engineering educators seek to advance and inculcate in their students is no less than that of law and medical school educators.[16] To the extent that the Board distinguishes among professional school faculties and their right to self-determination on the basis of grounds that exclude some groups of professional faculty, there exists further evidence to illustrate that, as suggested by the legislative history quoted earlier,

[16] The primary purpose of a profession was perhaps best described by Roscoe Pound, former Dean of the Harvard University Law School, as "the pursuit of a learned art in the spirit of a public service. . . ." R. Pound, THE LAWYER FROM ANTIQUITY TO MODERN TIMES, 5 (West. 1953). There has long been acknowledged within the engineering profession a "paramount responsibility" to "protect the health, safety and welfare of the public." Canon 1, Code of Ethics, Engineers Council for Professional Development. No less than other professional faculty members, engineering faculty should not have to accommodate the tenets of their profession to the demands and interests of other faculty members, nor should they have to compromise dearly held principles for the economically-based agenda of a collective bargaining unit.



the Labor Act does not fit relationships that exist within the academic community.[17]

Self-determination for groups of professional faculty is particularly important, because professional societies often establish professional standards and canons of ethics that justify, and indeed necessitate, treatment independent from all other university faculty. Unfortunately, unionization threatens to disperse and dilute this community of interest among a larger, more diverse body composed of all faculty members, and thus jeopardize the viability of professional associations. The end result is that the Labor Act becomes a vehicle for inhibiting academic freedom and freedom of association, a consequence that not only departs from the statutory scheme, but also introduces serious constitutional implications.

[17] In Florida, where 5400 faculty in all two and four year colleges were considered as one unit, the State Labor Relations Board ruled that engineering colleges were not professional and therefore not eligible for separate bargaining status, although the colleges of law and medicine did meet the professional criteria and were eligible. See *United Faculty of Florida* and *State University System Board of Regents, and related cases*, Case Nos. 8H-RC-755-0006 and 8H-RC-755-0052 (*University of Florida Engineering Faculty Ass'n and Engineering Faculty of Florida* and *State University System Board of Regents*), Slip. Dec. at 12-13 (Feb. 4, 1977).

## III. IN THE ABSENCE OF A CLEAR EXPRESSION OF CONGRESSIONAL INTENT TO BRING UNIVERSITY FACULTY WITHIN THE JURISDICTION OF THE LABOR BOARD, THE NLRA SHOULD NOT BE CONSTRUED IN A MANNER WHICH WOULD REQUIRE THE BOARD AND THE COURTS TO RESOLVE DIFFICULT AND SENSITIVE QUESTIONS ABOUT THE GUARANTEE OF ACADEMIC FREEDOM INHERENT IN THE FIRST AMENDMENT TO THE CONSTITUTION.

Academic freedom has been variously defined as "the right to teach, inquire, evaluate and study" [*Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957)]; the right to preserve the classroom as a marketplace of ideas [*Clark* v. *Holmes*, 474 F.2d 928, 931 (7th Cir. 1972)]; and the right of academicians to comment as other citizens do on matters of public interest [*Pickering* v. *Bd. of Education*, 391 U.S. 563, 568 (1968)]. As this Court noted recently, "a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values." *Ambach* v. *Norwick, et al., supra*, 47 U.S.L.W. at 4390. In recognition of this truism, and in acknowledgement of the fundamental difference between a commercial enterprise engaged in the production of goods and services and a university founded to promote the free exchange of ideas, it is essential that the guarantee of academic freedom include the right of professional faculty members to choose to educate their students in the principles and practices of a profession without the inhibiting force of split loyalties created by government-sanctioned collective bargaining units.

The potential impact of the NLRA upon associational rights of the faculty is derived as much from



the institutional and legal characteristics of unions as it is from the nature of academic institutions. Because labor unions regulate the rights and duties of union members, often in a minute fashion, they may impose upon their members a considerable body of "autonomic law"—that is nongovernmental "laws" and "rules" essentially similar in character to laws. As this Court indicated in *N.L.R.B.* v. *Allis-Chalmers, Mfg. Co.*, 338 U.S. 175, 180-195 (1967), Congress did not intend to regulate the internal affairs of unions but favored giving labor organizations powers similar to those possessed by legislative bodies. Professional associations such as the *Amicus*, however, as well as churches and other private institutions, have their own bodies of autonomic law, in the form of rules of discipline and professional ethics or controlling principles of conduct. See E. Bodenheimer, JURISPRUDENCE 330-34 (Harvard 1974) (Rev. Ed.). Where a conflict exists between two such "miniature legal systems," it often is possible to resolve them in favor of the national legal policy as embodied in federal statute. *See, e.g., Foley, Hoag & Eliot*, 229 NLRB No. 80 (1977). The presence of First Amendment interests, however, may necessitate a different result.

This Court recently had occasion to address the potential constitutional impact of collective bargaining upon church-related schools. *N.L.R.B.* v. *Catholic Bishop of Chicago*, 47 U.S.L.W. 4283 (U.S. March 21, 1979). The Court concluded that assertion of Board jurisdiction over such schools would raise difficult and sensitive questions arising out of guarantees of the First Amendment Religion Clauses. 47 U.S.L.W. at 4288. In examining the Act's legislative history, moreover, the Court observed that although

Congress gave no consideration to church-related schools, it did express an intent not to cover college professors *generally*. "It is not without significance," this Court declared, "that the Senate Committee on Education and Labor chose a college professor's dispute with the college as an example of employer-employee relations *not* covered by the Act." 470 U.S.L.W at 4387 (emphasis in original) (citation omitted). See note 10 *supra*, and accompanying text.

Of course, the Labor Act's potential impact upon First Amendment protected interests does not automatically preclude assertion of Board jurisdiction, particularly in the commercial sphere. *See, e.g., Associated Press* v. *N.L.R.B.*, 301 U.S. 103 (1937). The interests here involved, however, are analogous to those acknowledged as necessitating such preclusion in *Catholic Bishop, supra*, except that here it is not the institution which warrants protection, but those who operate the institution in the service of its fundamental purposes of education, research, and scholarly discourse. Where the Labor Act may conflict with the First Amendment interest in intellectual integrity asserted by faculty members whose primary obligation is the transmittal to their students of their professional expertise and principles, the statute should be construed to avoid potential constitutional conflict.

The threat posed to academic freedom by collective bargaining is not mere idle speculation. Administrative restraint on academic freedom often is avoided by faculty participation in academic government. See Note, *Developments in the Law-Academic Freedom*, 81 Harv. L. Rev. 1045, 1049 (1968). But restraint on academic freedom imposed from within by faculty bargaining associations is less subject to amelioration.



Indeed, one district court has ruled in a public sector case that a group of five teachers who were attempting to assert their constitutional right of "academic freedom" had waived that right under the terms of a collective bargaining agreement. *Cary* v. *Board of Education*, 427 F. Supp. 945 (D. Colo. 1977). "All of our constitutional rights," opined one commentator, "including academic freedom, are in serious jeopardy if the government is permitted to purchase such waivers under the cover of a union contract." Comment, *Union Waiver of Constitutional Rights: Academic Freedom as a Bargaining Chip in Union Contracts*. 49 U. Colo. L. Rev. 299 (1978). The danger presented is no less in the private sector.

If the Labor Act is applied to faculty, the protection of individual rights of faculty members can be no greater than that enjoyed by other employees under the Labor Act—*i.e.*, the right to be fairly represented, which is neither a constitutional protection, nor, for that matter, a substantial statutory protection. The doctrine of fair representation merely imposes a duty upon unions to represent their members fairly. *Vaca* v. *Sipes*, 386 U.S. 771 (1967), established that a union violates its duty of fair representation only if its conduct is "arbitrary, discriminatory, or in bad faith." *Id.* at 190. This standard, however, places only the most general limits upon union conduct, while greatly extending the consequences of union control.[18] Academic freedom, with

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[18] *Cf. International Brotherhood of Electrical Workers, et al.* v. *Foust*, 47 U.S.L.W. 4600 (U.S. May 29, 1979) (Railway Labor Act does not permit an employee to recover punitive damages for a union's breach of the duty of fair representation in processing an employee's grievance for wrongful discharge).

its close ties to crucial First Amendment rights, demands greater protection. "The right to assert this highly personal interest in intellectual freedom should not be vested exclusively in a union with virtually unlimited discretion." Note, *Developments in the Law-Academic Freedom*, 81 Harv. L. Rev., *supra*, at 1127.

Accordingly, were the Labor Act applied to university faculty, the concerns involved in preserving freedom of expression would warrant the elevation of the duty of fair representation to constitutional proportions. Yet, the difficulties entailed in monitoring union conduct in accordance with such a rigorous standard should, absent Congressional directive, discourage such a result. *Cf.* Truesdale, "The Duty of Fair Representation: Must it be effective to be fair?", 50 Daily Labor Report F-1 (BNA March 13, 1979). To avoid this dilemma, and still protect the academic freedom of faculty members, the Board should not be permitted to assert jurisdiction.

## CONCLUSION

For these reasons, we respectfully urge the Court to reject the contentions of the petitioner and affirm the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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